

**SUPREME COURT OF THE UNITED STATES**

**October Term, 1932**

**No. 717**

**EDWIN B. H. TOWER, JR.,**

*Petitioner*

**vs.**

**WATER HAMMER ARRESTING COOP.**

*Respondent*

**BRIEF OF RESPONDENT IN OPPOSITION TO  
PETITION FOR WRIT OF HABEAS CORPUS**

*no* / **BERTRAM WM. COLTMAN,  
RALPH W. BROWN,  
SIDNEY NEUMAN,**

*Counsel for Respondent*

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**BRIEF OF RESPONDENT IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

*May it Please the Court:*

The petition wholly fails to disclose the real situation in the instant case; its "Summary and Short Statement of the Matter Involved" is such that it requires correcting and supplementing. Cognizant of the duty imposed upon us by *Furness, Withy & Co. Ltd. v. Yang-Tsze Ins. Association, Ltd.*, 242 U. S. 430, 433, we accordingly make the following

**Restatement of the Facts**

Petitioner is a patent attorney practicing his profession at Milwaukee, Wisconsin (R. 78). In April, 1937, he was retained by the Fleming Manufacturing Company to prepare and file a patent application upon a water hammer arrester then being manufactured and sold by the Fleming

Company (R. 48a-49a; 54a).<sup>\*</sup> When respondent was organized in April, 1939, as the successor to the water hammer arrester business of the Fleming Company which included the filing of the patent application for which petitioner had been employed, he continued to act as attorney for respondent (R. 75a-76a).<sup>\*\*</sup>

Although adequate data to prepare the patent application was immediately made available to petitioner in 1937 (R. 49a-52a), there was constant and unreasonable delay on his part in preparing satisfactory claims and in submitting a properly drawn application to his client for execution. In September, 1939, the inventor of the device reminded petitioner that more than two years had elapsed since the application was ordered, exhorting him to complete and file the application immediately "on the basis of the facts as you have them" (PX-4). Petitioner replied on September 12, 1939, saying "I am now revising the application and it will be ready some time next week" (PX-5). For more than ten months thereafter nothing was heard from petitioner. On July 24, 1940, he forwarded a proposed application to the inventor who returned it unsigned, saying "In view of your delay in preparing this patent application,

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<sup>\*</sup>Petitioner persuaded the Circuit Court of Appeals to permit him to prepare an abbreviated printed record on appeal, in the form of an appendix. Respondent was forced to supply much additional necessary matter in a separate appendix. The printed "record" filed in this Court consists of these separate appendices plus the proceedings in the Circuit Court of Appeals. There is a consequent duplication in the numbering of some of the pages and, accordingly, we shall cite references to respondent's appendix, as "R-a." Moreover, the printed record filed in this Court does not include any of the documentary exhibits in this case. They will be found in the original transcript of record which we understand has been lodged here, and such of respondent's exhibits as we shall have need to refer to will be designated thus, "PX- ."

<sup>\*\*</sup>This is also confirmed by PX-69; PX-109; PX-110, and see Findings of Fact Nos. 70, 71, 72 (R. 53).

it no longer has any value to me." (PX-7). An application for patent was then (July, 1940) barred by reason of the public sale and use which had been made by the Fleming Company more than two years earlier, as appears from the concurrent findings of the courts below.\*

Within four days from the receipt of the inventor's letter returning the unsigned application, petitioner filed a patent application in the United States Patent Office showing the "same device" which had been shown in the application submitted to the inventor (R. 299a-300a), but listing petitioner as sole inventor of the subject matter and making the statutory oath that the device had not been on sale or in use in this country for more than two years before the filing of the application, matters which were manifestly known to petitioner to be untrue. Although petitioner then sought to collect the extraordinarily fantastic fee of \$12,978.76 for his services rendered to the Fleming Company and to respondent in the preparation of the patent application, he never advised or notified respondent, or the Fleming Company, or the original inventor that the patent application had been filed in petitioner's name.

Knowledge of the action taken by petitioner first came to respondent in February, 1942, when petitioner twice charged respondent with infringement (PX-75, 77) of patent No. 2,273,766 which had been granted to him on the device which had been shown in the application originally prepared by him for execution by respondent's inventor. At the same time, petitioner notified the Cook Electric Company, a supplier of materials to respondent, of its alleged infringement of the purported patent (PX-76).

This action was thereupon instituted by respondent under the Federal Declaratory Judgment Act (§ 274d Judicial

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\*See Findings of Fact Nos. 24, 25, 31 (R. 43, 45) and Opinion of Court of Appeals (R. 449).

Code; 28 U. S. C. § 400). The complaint averred that petitioner had charged respondent with infringement of the patent obtained by him (R. 2), that respondent was then manufacturing and selling and intended "in the future to manufacture and sell" the devices accused by petitioner (R. 3), and denied that respondent's "manufacture and sale is in violation of any legal right" of petitioner under his purported patent (*Ibid.*). By reason of this, it was averred "an actual controversy now exists between the parties hereto respecting the matter of validity of said Letters Patent No. 2,273,766 and the charge of infringement." (*Ibid.*). After setting forth in more detail the pertinent facts, *i.e.*, that the accused devices were like or substantially like devices manufactured and installed by the Fleming Company in 1936, of which Exhibits 1 and 2 attached to the complaint were illustrative (R. 3), that the relationship of attorney and client had theretofore existed between petitioner and respondent and respondent's predecessor in respect of the very subject matter of petitioner's purported patent (R. 4-5) and that petitioner had been guilty of a dereliction of duty in falsely claiming the invention as his own (R. 6-7), the complaint not only requested an adjudication of noninfringement but also expressly prayed (R. 10):

"That the Court adjudge and declare said Letters Patent No. 2,273,766 to be invalid and void;"

Petitioner did not concede noninfringement in his answer. On the contrary, while asserting that the 1936 Fleming device did not embody the subject matter of his purported patent (R. 12), because as he averred it was "an experimental appliance which was unsuccessful and inoperative" (R. 15), he persisted adroitly in the charge of infringement by asserting that the respondent's accused device was not the "same or substantially the same" as the water hammer arresters shown in Exhibits 1 and 2,

being the 1936 Fleming installations (R. 14-15). All other material allegations in the complaint were denied by petitioner and he accepted the challenge to the validity of his purported patent by insisting that he had, in fact, made the invention disclosed and claimed therein (R. 22) and by otherwise contending that it was good and valid in law.

Petitioner's attempt on the eve of trial to concede non-infringement and thus avoid a trial on the issue of validity which had been tendered by the complaint and joined in by petitioner's answer, took form as a motion for summary judgment (R. 24-25). As found by the Court of Appeals, the motion was based upon alleged facts which are unsupported by the evidence (R. 442-444). Moreover, in the exercise of sound discretion, the trial court denied the motion, and after a trial on the merits disposed of a renewal of the contention that no jurisdiction for declaratory judgment existed by occasion of the concession of noninfringement, by holding that an actual controversy existed at the time of the commencement of this action and "still exists in spite of defendant's [petitioner's] belated conclusion of non-infringement," that petitioner should not be permitted to deprive respondent of a judgment as to the validity of the purported patent and that "ascertainment of uncertain rights" was clearly in furtherance of the spirit and objective of the Federal Declaratory Judgment procedure (R. 33).

### **The "Question Presented"**

From the foregoing restatement of the facts, it is quite evident that the question posed by petitioner and said to arise in this case is not warranted by the real situation. As this Court consistently refuses to decide questions for which there is no substantial basis in the particular facts of a case (*Southern Power Co. v. North Carolina Pub. Serv. Co.*, 263 U. S. 508; *United States v. McFarland*, 275 U. S.



485; *Missouri-Kansas-Texas R. R. Co. v. Texas*, 275 U. S. 494), we make these preliminary observations of petitioner's spurious question:

1. It assumes that the complaint prayed only for a judgment of noninfringement.

Not so. The complaint also prayed for a judgment of invalidity of petitioner's purported patent. This was no hypothetical or abstract difference. In view of the previous attorney-client-relationship of the parties and petitioner's unprecedented action in filing a patent application in his own name for subject matter disclosed to him by his client, a real controversy was raging between the parties in respect of the validity of the purported patent, quite apart from the issue of infringement.

2. It assumes that petitioner's answer in this action admitted noninfringement by respondent.

Not so. In his answer petitioner asserted that the 1936 Fleming devices did not embody the subject matter claimed in his purported patent and that they were noninfringements but he averred that respondent's accused devices were not "the same or substantially the same" as the 1936 devices and thus squarely took issue with respondent on the question of alleged infringement. Now that the courts below have ruled, contrary to petitioner's contentions, that the 1936 devices embodied the subject matter of petitioner's patent, he should not be heard to say that his answer admitted noninfringement.

3. It assumes that petitioner's motion for dismissal purporting to admit that respondent had not infringed and was absolved of any charge of infringement constituted a concession of all of the relief to which respondent was entitled.

Not so. As found by the Court of Appeals the motion was based on facts which beyond peradventure were unsupported by the evidence. The motion assumed and alleged that all of the accused devices had a  $1/16$  inch clearance between the bellows and the casing, and not a "close fit" as described in the patent and claims (R. 24). But neither the patent claims nor its specifications contained any limitation to a "close fit"\* and some of respondent's devices had less clearance than  $1/16$  inch. Since neither petitioner nor his expert (R. 291a) was able to fix the precise limitation which constituted a "close fit"; since the evidence showed that petitioner's patent was predicated upon devices disclosed to him by respondent's predecessor, the Fleming Company, which had clearances ranging from  $1/32$  inch to  $3/64$  inch;\*\* and since also the accused devices were substantially the same as these earlier Fleming devices, it was held by the Court of Appeals that the alleged concession of noninfringement did not give respondent the relief to which it was entitled (R. 444).

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\*In its opinion the District Court said (R. 34):

"The defendant failed to define a close fit between the casing and bellows in his patent but now attempts to restrict it to  $1/32$ " as distinguished from  $1/16$ "; but he gives no information as to the twilight zone so that the public has no way of knowing the limits of his patent."

\*\*For example, the device shown in PX-90 is based upon a sketch made by John S. Baker on July 11, 1936 (PX-133) which had shown a clearance of precisely  $1/32$  inch. It was found by the Circuit Court of Appeals that this information "was fully known" by petitioner when he filed his application (R. 444).

**ARGUMENT****I.**

IN THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE, THE DISTRICT COURT'S DISCRETION WAS SOUNDLY EXERCISED IN FAVOR OF RETAINING THE PATENT VALIDITY CONTROVERSY, DESPITE THE CONFESSION OF NONINFRINGEMENT. SUCH ACTION COMPORTED WITH THE STANDARDS OF GOOD JUDICIAL ADMINISTRATION AND WAS PROPERLY APPROVED BY THE COURT OF APPEALS.

The burden of petitioner's argument under Points I and II is that there was no longer any justiciable controversy between the parties after he had attempted to concede non-infringement on the eve of trial. The argument is untenable in that, like the spurious question presented, it wholly ignores these salient factors: petitioner himself created an actual controversy when he applied for and obtained in his own name a patent for a device disclosed to him by his client; petitioner sharpened that controversy and made it definite and concrete when he asserted the validity of his purported patent against his former client and charged infringement; and the complaint in this action directly placed the validity of petitioner's purported patent in issue and prayed for a declaratory judgment of invalidity. Much more than mere infringement was present in the controversy in these circumstances. As of the date on which the complaint in this case was filed, the parties hereto had adverse legal interests in respect of the validity of a patent which not only covered a device which respondent and its predecessor had manufactured since 1936 and which formed the very basis of the patent, but which had been obtained by petitioner in violation of the duties owed by an attorney to his client as well. Entirely apart from the continuance of charges of infringement, the prior fiduciary relations of the parties were susceptible of an immediate and definitive determination of the legal rights of petitioner to his patent.

Without question, the District Court was invested with general jurisdiction to hear and adjudicate the validity controversy upon the filing of respondent's complaint. This is abundantly clear from this Court's decision in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U. S. 270, where, emphasizing the difference between an abstract question and a "controversy," it is said (p. 273):

"\* \* \* Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

Thus, whether or not the District Court should have proceeded to declare the rights of the parties as to the validity of the patent did not depend upon considerations of jurisdiction or power, as urged by petitioner, but rather was a matter of procedure resting in the sound discretion of the court. And whether a court in its discretion should make a requested declaration is a question to be decided on the basis of the facts in each case. The extent to which the declaratory judgment procedure may be used in the federal courts always lies in the sound discretion of the courts. *Brillhart v. Excess Insurance Co.*, 316 U. S. 491; *Great Lakes Co. v. Huffman*, 319 U. S. 293, and *Alabama Federation of Labor v. McAdory*, 325 U. S. 450, 471.

In *Great Lakes Co. v. Huffman*, *supra*, this Court said that when a District Court is called upon to adjudicate what is essentially an equitable cause of action, it is as free as in any other suit in equity "to grant or withhold the relief prayed, upon equitable grounds", calling attention to the House report on the legislation which declared that "large discretion is conferred upon the courts as to whether or not they will administer justice by this procedure." H. R. Rep. No. 1264, 73d Cong., 2d Sess., p. 2.

In the exceptional circumstances of this case, there can be no possible ground for interference with the District Court's exercise of discretion in adjusting the manner by which the issue of validity should be adjudicated, *viz.*, by denying petitioner's motion for summary dismissal and proceeding with a hearing of the merits, unless it was indisputably abused. But that discretion was soundly exercised and in a manner which finds its basis in good reason. Moreover, it was not exercised arbitrarily, but rather in accordance with fixed principles of law, since it is now the better practice to inquire fully into the validity of a patent because of the great public importance of such questions. *cf. Sinclair Co. v. Interchemical Corp.*, 325 U. S. 327, 330.

The motion for dismissal, moreover, rested upon claims which the petitioner was later unable to establish on the trial. The correctness of the order denying the motion and the wisdom of the court's exercise of discretion was revealed during the trial when petitioner, unable to fix precisely the critical dimension or clearance which he claimed as his own invention, finally put it at  $1/32$  inch only to be refuted in this claim by respondent's evidence showing that as early as July 11, 1936, one Baker made a sketch showing a clearance of precisely  $1/32$  inch, which was disclosed to petitioner and fully known to him when he filed his application (*ante*, p. 7).

Where it was asserted, as it was in the complaint in the instant case, that the patent taken out by petitioner, a patent attorney, is invalid because based upon disclosures made by the respondent, petitioner's client, and a motion for dismissal was addressed to the court on the ground that the attorney's invention was a "close fit" as against  $1/16$  inch in the putative infringement, the utmost caution was required of the court in disposing of the motion, lest a "close fit" be, in fact, the same as  $1/16$  inch and the declaratory judgment plaintiff thereby deprived of an ad-

judication to which it was entitled. No detailed explanation of all of the factors which governed the exercise of discretion by the District Court need be given. It is enough that, as appears from the concurrent findings of the District Court and the Court of Appeals, the evidence taken by the court showed that there was no scope of the patent claims available to petitioner as constituting his separate domain as distinguished from the subject matter invented, and disclosed to him, by the client. There was thus no room for the concession of noninfringement attempted by petitioner. His motion was no more than a subterfuge to avoid a disclosure of the evidence which showed this very fact and certainly no abuse of discretion was committed by the court in recognizing the true character of the eleventh hour action taken by petitioner and in conducting a full and detailed inquiry into the facts.

The issue of validity constituted the primacy of this action. That issue never became moot; nor could it be made so by the unilateral act of petitioner, based as it was, upon alleged facts which could not be supported by evidence. Validity here was no more moot than was validity in *Allvater v. Freeman*, 319 U. S. 359, 364-365, where this Court said:

“\* \* \* A controversy was raging, even apart from the continued existence of the license agreement. That controversy was ‘definite and concrete, touching the legal relations of parties having adverse legal interests.’ *Aetna Life Ins. Co. v. Haworth*, *supra*, pp. 240-241. That controversy concerned the validity of the reissue patents. \* \* \*

“Our conclusion is that it was error for the Circuit Court of Appeals to have treated the issues raised by the counterclaim as moot. They were not moot; \* \* \*”

Because the evidence shows that legally and factually there was no issue of infringement separate and apart

from the issue of validity; because it shows that the issue of infringement was in the very nature of things the issue of validity itself; and because formally conceding mere noninfringement without also confessing invalidity was not a full and complete disposition of the controversy between the parties, retention of jurisdiction to give respondent all of the relief to which it was entitled was not either an excess of power or an abuse of discretion.

## II.

THERE IS NO CONFLICT BETWEEN THE SECOND CIRCUIT DECISIONS AND THAT IN THE CASE AT BAR. THE DIFFERENT RESULTS REACHED ARE DUE ENTIRELY TO DIFFERENT FACTUAL SITUATIONS AND NOT AT ALL TO ANY DISAGREEMENT AMONG THE COURTS AS TO THE PROPER INTERPRETATION OF THE DECLARATORY JUDGMENT ACT OR REGARDING THE APPLICABLE RULES OF DECISION.

There is no occasion to resolve in this case any real and embarrassing conflict between the Courts of Appeals for the Second and Seventh Circuits. There is no difference of opinion among the courts as to the proper interpretation of the Federal Declaratory Judgment Act. The two courts have not applied different rules of decisions to identical facts. The very most that can be said of the courts is that in cases involving different facts, they have reached different results. These different results were of necessity inevitable because each court has had to decide each case on its own particular facts.

The apparently conflicting results among the circuits are made so only by ignoring, as petitioner has done, essential matters present in the case at bar. By no other method can this case be likened to *McCurrach v. Cheney*, 152 F. (2) 365, which was a case arising under the Federal Declaratory Judgment Act. A comparison of the facts of that case with the real situation involved here shows that whereas the *McCurrach* case supports petitioner's "question pre-

sented" that same question cannot be said to be adequately supported by the facts in the case at bar.

The facts here are exceptional in that the validity of petitioner's patent was the primary issue involved in the controversy between the parties because of their previous attorney-client-relationship. A similar factual picture is wholly lacking in the *McCurrach* case where a disclaimer of infringement put an end to the controversy between the parties. Judge Clark clearly delineated and emphasized the difference in his concurring opinion in the *McCurrach* case, when he protested against placing the result on the "arid ground of lack of 'jurisdiction'" instead of on "grounds of discretion", and warned that there "may well be cases where a defendant's acts show an actual controversy, notwithstanding the protective screen of a verbal disclaimer." The case at bar is precisely such a case as was supposed by Judge Clark, and the fact that Judge Clark concurred in the *McCurrach* case, preferring, however, to rest the decision on discretion rather than jurisdiction, suffices to show that the *McCurrach* case was of an entirely different character.

*Larson v. General Motors Corp.*, 134 F (2) 450, also involved a situation wholly unlike that in the case at bar. There the patent owner had brought an ordinary patent infringement suit and defendant had included in its answer a declaratory judgment counterclaim asking that the patent be declared invalid and/or not infringed. At the opening of trial the patentee admitted that he did not claim infringement. A decree of dismissal on the merits was thereupon entered and in these circumstances it was held by the Second Circuit Court of Appeals that in the exercise of its discretion the trial court should not have proceeded with the hearing of the declaratory judgment counterclaim and should not have entered judgment declaring the patent invalid because such a declaration was "not necessary".



The rationale of the *Larson* case is consistent with that of the case at bar. Quite significantly, the Second Circuit Court of Appeals expressly recognized (134 F. (2d) 453) that the issue before it was one involving "the discretion of the judge" and not one challenging his power. Conceiving the trial court's exercise of discretion to be "reviewable as in other cases," under the authority of *Brillhart v. Excess Insurance Co.*, 316 U. S. 491, (*ante*, p. 9), the Second Circuit Court considered all of the facts and circumstances and concluded that the "judge should have refused to make any declaration as to the validity of the patent."

Moreover, whereas, it was expressly found in the *Larson* case that the alleged infringer had "no interest" in a declaration of invalidity, in the case at bar, the respondent clearly had such an interest.

*Cover v. Schwartz*, 133 F (2) 541, is also represented by petitioner as being in conflict with the decision in the case at bar, but this contention is manifestly unwarranted. That case was an ordinary patent infringement action. After a trial and a dismissal of the action, the patentee plaintiff prosecuted an appeal, expressly disclaiming however any charge of infringement. Obviously, the case or controversy which had formed the subject matter of the action and which had supported the jurisdiction of the District Court, became in that event moot and the Second Circuit Court of Appeals very properly held that it was without power to render an advisory opinion to the plaintiff on the validity of his patent.

Clearly *Cover v. Schwartz* is not at all like the case at bar. It is just as clear that *Larson v. General Motors* turned on considerations of discretion and since discretion also was involved in the case at bar, there can be no conclusion of a conflict, especially since identical facts are not found in each case. The *McCurrach* case seemingly

turned on power or jurisdiction, but in view of the absence from the case of any compelling reasons for inquiring into validity, it cannot be said to be the same in character as the instant one.

The results reached in all the cases are reconcilable; there is no conflict among the courts of the sort which the prior decisions of this Court have held were essential to move it to grant a writ of certiorari.

### CONCLUSION.

This case does not involve any principles, settlement of which is of importance to the public as distinguished from the parties, and there is no real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully,

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